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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re M.D., A Person Coming Under the
Juvenile Court Law.

B213206
(Los Angeles County
Super. Ct. No. CK67712)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

B.D.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Jan G.
Levine, Judge. Affirmed.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and
Appellant.

Office of the County Counsel, James M. Owens, Assistant County Counsel, Fred
Klink and Tracey Dodds, Deputies County Counsel, for Plaintiff and Respondent.

No appearance for Minor.

* * * * *

In this combined appeal, B.D. (mother) appeals from the juvenile court's orders denying her second petition under Welfare and Institutions Code¹ section 388 and terminating her parental rights to her youngest son, M.D. (age 2). Mother contends that the juvenile court denied her due process by not appointing an attorney to represent her at the hearing on her section 388 petition and by preventing her from presenting certain evidence at the hearing. We disagree and affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

M.D. first came to the attention of respondent Los Angeles County Department of Children and Family Services (the department) in April 2007 when he tested positive for cocaine at birth. The department filed a section 300 petition on his behalf, alleging substance abuse by mother and M.D.'s father, who is not a party to this appeal.² Mother and M.D.'s father, a registered sex offender, have a history of substance abuse and domestic violence. The court sustained the petition and ordered that mother be provided with monitored visits and that she participate in individual counseling to address domestic violence, parenting education, drug counseling and random drug testing. At the six-month hearing in December 2007, the court found that mother had only partially complied with the case plan, terminated her reunification services and set the matter for a section 366.26 hearing.³ In March 2008, the department removed M.D. from his foster placement and placed him with his paternal aunt. At this time, a privately retained attorney began representing mother.

¹ All statutory references shall be to the Welfare and Institutions Code, unless otherwise noted.

² The petition was also filed on behalf of M.D.'s half-sibling, B.A., who is 18 years old and not a party to this appeal. Mother has two other sons who live with their father.

³ Mother filed a petition for extraordinary writ challenging this order, which we denied in an unpublished opinion in *Belinda D. v. SCLA (DCFS, RPI)*, case No. B204464, filed on March 24, 2008.

In April 2008, mother filed her first petition under section 388, seeking unmonitored visits, reinstatement of her reunification services and setting aside of the order scheduling the section 366.26 hearing. The court set a hearing on the petition for June 10, 2008. In the meantime, the department reported that mother had refused to allow M.D. to have a scheduled urology surgery; had an “ongoing, argumentative, confrontational, paranoid-like personality” that had created a barrier for her to be in agreement with M.D.’s aunt and from allowing his aunt stability in meeting M.D.’s needs; had called the social worker on nearly a daily basis with issues that had no justification; and had an “unreasonable and unreceptive nature to accept solutions, suggestions, or explanation” that had become “exhaustively draining” for the department’s staff and M.D.’s aunt.

At a visit with M.D. and his brother B.A. at the department’s office on April 16, 2008, mother arrived upset and began yelling at M.D.’s aunt, causing B.A. to become withdrawn and walk around the room mumbling. At a subsequent visit at the department on April 24, mother arrived five minutes before the visit was scheduled to end and became so argumentative and “out of control” with the social worker that a security guard had to escort her out of the office. B.A., who was present at the visit, stated that he would “rather be in a mental hospital, th[a]n putting up with this chaos.” Mother was escorted out of the office a second time at a visit on May 29, when she again became argumentative with the social worker, causing M.D. to cry and fuss. At mother’s repeated requests, a new social worker was assigned to the case. M.D. finally had surgery in May 2008. Following his surgery he cried out for his aunt, but mother refused to hand him over. The department reported that M.D. was bonded with his aunt, who wanted to adopt him. The department also reported that mother was in partial compliance with her case plan, but was not consistently drug testing. After testimony and argument at the June 10, 2008 hearing, the court denied mother’s first petition under section 388.

Mother filed a second petition under section 388 on October 14, 2008, seeking custody of M.D. Attached to her petition was documentation showing that she had

completed her court-ordered counseling programs, was attending AA/NA meetings three or four times a week, and was complying with her therapy and medication for depression. The court set a hearing on the petition for December 9, 2008, and continued M.D.'s section 366.26 hearing to the same date.

The department reported that the adoptive home study for M.D.'s aunt had been approved, and recommended adoption as the permanent plan for M.D. The new social worker assigned to the case reported that mother continued to be "disrespectful, argumentative, oppositional and basically difficult to work with, as she had been with the previous workers." Mother refused to comply with the department's visitation rules that had been explained to her and her attorney. Mother spent most of her visits talking on her cell phone and sending text messages. The social worker did not believe that mother had applied any of her learned parenting skills, and noted that another agency, which had been monitoring mother's weekend visits with all of her children, had terminated that service due to mother's noncompliance with visitation rules and her inability to control her children. Mother missed three visits and on one visit, after M.D. had been sick all week, allowed him to get wet, then took him into an air-conditioned room, causing him to relapse. Mother was so disruptive during one of M.D.'s medical examinations that his aunt left the examination room. The social worker opined that mother did not use common sense, was irresponsible regarding M.D.'s well-being and did not have appropriate parenting skills.

On December 9, 2008, the day of the hearing on the second petition under section 388, mother's attorney filed a motion to be relieved as counsel on the grounds that their relationship had "deteriorated to such an extent" that he could no longer effectively represent mother and that mother had asked that he cease representing her. At the hearing, when the court stated that it would grant the motion but would not grant any more continuances because mother had already had plenty of time to find a new attorney, mother stated, "I requested it last time I was here. I said I need a new lawyer. I can't afford him." After mother's former attorney offered to testify as a witness, the court stated that it was going to proceed with the hearing on the section 388 motion and mother

responded, “That’s fine. That’s fine.” When the court asked mother if she wanted to represent herself, she said yes. Her former attorney stated that he would be in the building all day and then left the courtroom.

The court found that mother had demonstrated changed circumstances and proceeded to the issue of whether granting the section 388 petition was in M.D.’s best interest. Mother asked if she could call her therapist to testify, but the court responded that the therapist did not know M.D. Following arguments by mother and the other parties, the court found that granting the petition would not be in M.D.’s best interest. The court then designated M.D.’s aunt as his prospective adoptive parent and indicated that it was going to proceed with the section 366.26 hearing. At that point, M.D.’s attorney expressed concern that mother did not have an attorney at such a critical juncture. Mother asked, “What is a .26? I don’t understand.” The court agreed to continue the section 366.26 hearing, instructed mother that it was not going to entertain any more section 388 petitions, and appointed counsel for mother. At a subsequent hearing later that same day, mother met her newly appointed attorney.

On January 13, 2009, the court conducted the contested section 366.26 hearing. Mother and her appointed attorney were present. Mother testified that since April or May 2008 she had been having monitored visits with M.D. once a week for an hour, that he reached out to her and was sad when the visits ended, and that she called his aunt once or twice a week to check on his progress. B.A. testified in chambers that he had been visiting with M.D. every week since M.D. was born and that he was not sure if he wanted M.D. to be adopted. M.D.’s prospective adoptive parent testified that she would allow the visits between M.D. and B.A. to continue after she adopted M.D. She also testified that while mother’s initial visits with M.D. “went okay,” after mother’s “outburst” with B.A.’s caretaker, mother “was pretty much that same demeanor every visit, confrontational, argumentative, berating.” She also testified that when M.D. sometimes cried during the visits, it was because of the tumultuous nature of the visits and not because the visits were ending. After arguments of counsel, the court terminated mother’s parental rights to M.D.

Mother's appeals from the orders denying her second petition under section 388 and terminating her parental rights to M.D. have been consolidated.

DISCUSSION

I. Right to Counsel.

Mother contends that the juvenile court violated her constitutional right to due process when it relieved her attorney from representing her at the beginning of the December 9, 2008 hearing on her section 388 petition seeking custody of M.D. and conducted the hearing without appointing her a substitute attorney. We disagree.

A. Statutory Right to Counsel

A parent's right to appointed counsel in dependency proceedings is a statutory right. (*In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1195.) Section 317, subdivision (b) requires appointment of counsel for an indigent parent or guardian in a juvenile dependency case "unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section." A denial of the statutory right to counsel is reviewed under the harmless error standard in *People v. Watson* (1995) 46 Cal.2d 818, 836. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1668.) Thus, "[w]ith respect to a parent's assertion of a violation of the statutory right to representation or the statutory right to adequate representation, the parent must also show 'it is "reasonably probable . . . a result more favorable to the appealing party would have been reached in the absence of the error.'"" (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153; see also *In re Ronald R.*, *supra*, at p. 1195; *In re Malcolm D.* (1996) 42 Cal.App.4th 904, 919.)

Although mother sets forth the basic statutory framework in her opening brief, it is not clear whether she is arguing that her statutory right to counsel was violated. Mother does suggest that she cannot be found to have made a knowing and intelligent waiver of counsel in the absence of any discussion by the court of "the dangers and disadvantages of self-representation and the risks and complexities of [] her particular case." (*In re*

A.M. (2008) 164 Cal.App.4th 914, 923.) While the department argues to the contrary, we need not decide whether mother waived her statutory right to counsel. Even assuming there was a statutory violation of the right to counsel at the hearing on mother's section 388 petition, as addressed in the due process discussion below, mother has not demonstrated on appeal that it is "reasonably probable" that a result more favorable to her would have resulted had she been represented at the hearing.

B. Due Process

Although a parent may have a due process right to counsel at certain stages of dependency proceedings under *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 33, "[i]n post-Lassiter dependency cases in California, it appears settled that whether a due process right to counsel existed at the lower court hearing depends on whether the presence of counsel would have made a 'determinative difference' in the outcome of the proceeding." (*In re Ronald R.*, *supra*, 37 Cal.App.4th at p. 1196.) Whether a parent has a due process right to counsel at any particular point in a dependency proceeding "must be evaluated on a case-by-case basis." (*Ibid.*) To establish a due process right, "'a parent must demonstrate on appeal that the absence of counsel made a 'determinative difference' and 'render[ed] the proceedings fundamentally unfair.''" (*Id.* at pp. 1196–1197; *In re Malcolm D.*, *supra*, 42 Cal.App.4th at p. 921.)

Mother has not shown how the presence of counsel would have resulted in a different outcome at the hearing on her second petition under section 388. She merely concludes that her lack of representation prevented her from making a showing that granting the petition was in M.D.'s best interest. But mother does not explain what that showing would involve or how having an attorney present would have made a difference.

Nor does it appear to us that the presence of counsel would have resulted in a more favorable result for mother. Having counsel present would not have changed the facts that M.D. was in a stable home with his paternal aunt, who was committed to adopting him and with whom he was bonded; that mother had not graduated to unmonitored visits with M.D. outside of the department's offices; and that mother continued to display an

angry, confrontational, disruptive manner at visits that caused distress for M.D. and his sibling. In short, there is nothing in the record before us to suggest that granting the section 388 petition would have been in M.D.'s best interest.

We conclude that there was no due process violation with respect to mother's right to counsel at the December 9, 2008 hearing.

II. Presentation of Evidence.

Mother separately contends that the juvenile court deprived her of due process by preventing her from presenting certain evidence at the December 9, 2008 hearing. We find no merit to mother's contention.

"While a parent in a juvenile dependency proceeding has a due process right to a meaningful hearing with the opportunity to present evidence [citation], parents in dependency proceedings 'are not entitled to full confrontation and cross-examination.'" (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146.) Given the state's strong interest in the expeditious resolution of dependency proceedings, due process permits the nonarbitrary exclusion of evidence, such as when the presentation of evidence would result in an undue consumption of time. (*Ibid.*; Evid. Code, § 352.) "The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*Maricela C. v. Superior Court, supra*, at p. 1147.)

Mother claims that the court denied her the opportunity to present evidence of clean drug tests. But as mother herself points out, the evidence of clean drug tests was relevant to the issue of whether mother had demonstrated a change of circumstances, and the court found in mother's favor on that issue.

Next, mother claims the court prevented her from calling B.A. to testify. But she points to no place in the record where she sought to call B.A. as a witness. At the December 9, 2008 hearing, mother merely stated that B.A. had no rights in juvenile hall, that her boys loved her and that "[i]f you bring my boys in here, they'll tell you they want to come back home." We do not interpret this as a request for B.A. to testify. But even if we did, his testimony that he loved his mother and wanted to live with her would have no

bearing on the issue of whether returning M.D. to her custody would be in M.D.'s best interest.

Finally, mother challenges the juvenile court's refusal to allow her therapist to testify. She argues that the therapist's testimony could have verified her personal growth. But, again, mother's personal growth would only be relevant to the issue of whether she had demonstrated a change of circumstances, which the court found to be the case. Mother also argues that the therapist's observations of mother's treatment of her other children would have been relevant to show how M.D. would have benefitted from maintaining his relationship with mother. But mother does not explain how her treatment of other children would be relevant to the issue of M.D.'s best interest.

We find no due process violation with respect to the presentation of evidence at the December 9, 2008 hearing.

III. Termination of Parental Rights.

Mother argues that if we reverse the order denying her second petition under section 388, we must also reverse the order terminating her parental rights to M.D. Because we are not reversing the order denying her section 388 petition, and because mother has not presented any other arguments as to why it was error to terminate her parental rights to M.D., the order terminating her parental rights to M.D. is also affirmed.

DISPOSITION

The orders denying mother's second petition under section 388 and terminating her parental rights to M.D. are affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ